IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.73 OF 2007
IN
NOTICE OF MOTION NO.2219 OF 2005
IN
SUIT NO.2468 OF 1986

M/s. Umesh Silk Mills & Ors. .... Appellants
Vs.
Uco Bank .... Respondents

Shri M.K. Nesari for the Appellants.

Shri Kedar Dighe for the Respondents.

CORAM: R.M.S. KHANDEPARKAR &
D.G. KARNIK, JJ.

DATED: MARCH 21, 2007

P.C:

1. Heard. This appeal arises from the order dated 19-12-2006 passed in Notice of Motion No.2219 of 2005. By the impugned order, the notice of motion taken out by the appellants has been discharged. The said notice of motion was taken out to set aside the decree dated 12-7-2005. The contention of the appellants was that they were not able to appear in the Court on 12-7-2005 as they were not aware of the said date of hearing since they were not informed about the same by their Advocate. The learned single Judge has disbelieved the appellants on this aspect of the matter on analysis of all the materials on record and has held thus:

"2. Perusal of the order shows that the Court has noted that the matter was before the Court on several occasions. Perusal of the correspondence between the lawyer for the defendants and the defendants shows that by letter dated 7.6.2005 the son of defendant no.2 was informed by the lawyer that the matter was listed for hearing before this Court and that he had tried several times to contact him telephonically but he was unavailable and therefore, he was requested to contact the lawyer immediately. The next letter again addressed to son of the defendant no.2 dated 13.6.2005. Again he was informed that the matter was listed before the Court, even serial number on which the matter was listed is mentioned and he was requested to contact the lawyer immediately. By letter dated 27.6.2005, it appears that between 13.6.2005 and 27.6.2005 there was telephonic conversation between the second defendant and the lawyer and on telephone the lawyer informed the defendant no.2 that they have to make

arrangement for engaging any other lawyer. He was also informed that the matter has been appearing before this Court for last three weeks. He was also informed that the next time when the matter will appear before the Court, the lawyer will apply for discharge. The defendant no.2 was requested to make alternate arrangement immediately to avoid inconvenience. This letter was admittedly received by the defendant no.2. But in the affidavit that is filed by the defendant no.2, the defendant 2 has not disclosed as to what he did after his lawyer told him one week before 27.6.2005 that he has to take immediate steps. He has said in his affidavit that he booked tickets for Bombay on 2.7.2005. There is no explanation to be found as to why he could not come to Bombay earlier though the lawyer had told him that in no uncertain terms he has to move at the earliest. It appears from the letter of lawyer dated 8.7.2005 that there was no communication from defendant no.2 to the lawyer even after receiving letter dated

27.6.2005. Therefore, by letter dated 8.7.2005 the lawyer informed the defendant no.2 that they will be mentioning the matter before the Prothonotary for taking discharge. The matter was before the Court on 12.7.2005. According to the defendant no.2, he was in Bombay on 12.7.2005. He does not state in his affidavit that the lawyer did not inform him that the matter is before the Court on 12.7.2005. If the defendant no.2 was in Bombay on 12.7.2005 and he was in contact with his lawyer from 11.7.2005, it cannot be believed that the lawyer did not inform him that the matter is before the Court on 12.7.2005. When the defendant no.2 admittedly was in Bombay on 12.7.2005 he should have appeared before the Court but he has chosen not to appear. Therefore, even assuming that the decree passed by the Court though it is on merit, is an ex-parte decree, the reason given by the plaintiff for not appearing cannot be termed as sufficient cause. What is pertinent to note is that the suit is filed by the Nationalised Bank

for recovery of the dues against the defendants and so far as the claim of the bank is concerned, in the written statement the defendants are not disputing that claim. Therefore, at the hearing of the motion I put it to the learned Counsel appearing for defendants that if the defendants are willing to deposit decreetal amount in the Court, the question of giving him an opportunity to contest the suit on merit can be considered. The learned Counsel states that without taking instructions he cannot make any statement. In my opinion, in the circumstances, if the defendants were keen on getting opportunity they should have themselves voluntarily made statement that they are willing to deposit the full or part of the decreetal amount in the Court. But the conduct of the defendant shows that after having utilised the public fund they just want to kill time and that is the sole purpose behind taking out this notice of motion. The notice of motion is therefore, disposed of."

2. Plain reading of the above quoted para and the records which were available before the learned single Judge apparently disclose that the appellants had contacted their lawyer on 11-7-2005. However, in spite of being in the Town, they failed to attend the Court on 12-7-2005. The records also disclose that since the beginning of June, 2005 the Advocate for the appellants had informed the appellants about his intention to withdraw his appearance for the appellants and about the need of presence of the appellants to engage another lawyer in the matter. The records also disclose that the matter in the suit was required to be adjourned on several occasions on account of the inability of the Advocate for the appellants to cross-examine the plaintiffs and their witnesses in the absence of the necessary instructions. In these background, the learned single Judge has disbelieved the claim of the appellants that they were not informed about the date of hearing of the matter i.e., 12-7-2005 or that the appellants were not aware of the date of the hearing being 12-7-2005.

3. The learned Advocate for the appellants submitted that the letter written by the Advocate to the appellants on 11-7-2005 apparently discloses that the appellants were required to attend the office of the Prothonotary & Senior Master only on 14-7-2005 to deal

with the aspect of withdrawal of the appearance of their Advocate and therefore they were under the impression that the hearing of the matter would be only on or after 14-7-2005 and that they would seek further time to enable the appellants to engage other Advocate. The contention is totally devoid of substance. Very fact that the letter of 11-7-2005 was personally collected from the Advocate by the appellants would lend support to the findings arrived at by the learned single Judge in the impugned order that the appellants must have been made fully aware of the date of hearing of the matter which was fixed on 12-7-2005 when the appellants had contacted their Advocate on 11-7-2005. That apart, no party to a proceeding is entitled to presume that he/she can get adjournment as a matter of course on mere asking. It was not permissible for the appellants to presume that on their appearance on 14-7-2005, they would be granted further time to enable them to engage another Advocate, more particularly, in view of the facts revealed from the records which disclose that the appellants were made aware about the necessity of engaging another Advocate much prior to 11-7-2005 and as long back as on 13-6-2005. There is absolutely no explanation as to why no steps could be taken from 13-6-2005 till 12-7-2005 to engage another Advocate in place of the earlier Advocate who had expressed his unwillingness to continue to appear for the appellants.

It is not the case of the appellants that they did not inquire about the date of hearing of the matter before the Court. The appearance on 14-7-2005 was admittedly before the Prothonotary & Senior Master and not before the learned single Judge before whom the matter was heard.

4. In the circumstances, the learned single Judge in his discretion, which has been judicially exercised, dismissed the application filed by the appellants and has discharged the notice of motion. We do not find any fault in the impugned order nor it warrants any interference in the appeal and none of the findings are shown either to be perverse or being not borne out from the records. Hence the appeal fails and is rejected with costs.

(D.G.Karnik, J.) (R.M.S.Khandeparkar, J.)

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